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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 787

P. B. WEST, ADMINISTRATOR OF THE ESTATE OF JOHN JACOB GIFFORD,

Petitioner,

vs.

EASTERN TRANSPORTATION COMPANY, INCORPORATED, A CORPORATION

PETITION FOR WRIT OF CERTIORARI

MAY IT PLEASE THE COURT:

The petition of P. B. West, Administrator of the Estate of John Jacob Gifford, deceased, respectfully shows to this Honorable Court:

(A)

Summary Statement of the Matter Involved

This case involves:

(1) The duty owed by the master of the vessel to a seaman, in hiring him.

(2) Retaining him after the employment.

(3) When the duty started and when it concluded.

This is an action originally brought in the United States District Court for the Eastern District of Virginia for damages, to-wit: Twenty-five Thousand Dollars ($25,000.00), under the Jones Act, Section 688 of the United States Code, brought by the Administrator of the Estate of John Jacob Gifford, deceased, hereinafter called the "plaintiff" against the Eastern Transportation Company, hereinafter called the "defendant" to recover for the death of the deceased.

The deceased was employed as a cook on board the LUTHER E. HOOPER, a barge owned and operated by the defendant. He was engaged by the Captain of the barge, Robert F. Melvin, on the morning of May 22nd, 1947 and according to testimony of the Captain and "donkeyman" on the barge, John Jacob Gifford came aboard the barge between 9:00 and 10:00 o'clock, A. M. the same day. Later in the same day the deceased told Fisher who was in charge of the barge that he was going to jump overboard. Thereupon, Fisher, then the only member of the crew on the barge, left him alone and he was not seen again. His body was recovered from Norfolk harbor, the body of water where the barge was moored, three days later. From written testimony of the Captain of the barge, introduced by stipulation entered into between the parties, the Captain knew the deceased had been drinking excessively when he hired him. From testimony of the "donkeyman" it appears that his actions were not normal after boarding the barge and that he appeared in bad mental and physical condition. The "donkeyman's" testimony further reveals that a part of the guard rail on the barge had been damaged prior to the disappearance of the deceased. The Captain's statement describes the guard rails of the barge as knee high, while Fisher testifies they were waist high.

Robert F. Melvin, captain of the ship, made the unqualified and uncontradicted statement as follows:

"When I employed Gifford, he had been drinking.

"On previous trips, I had noticed that Gifford did drink to excess. From my experience, which consists of thirty-eight years' sailing, I would say that it would be very easy for a man in a doped or intoxicated condition to lose his balance and fall over the side of the LUTHER E. HOOPER. The hand rail or guard rail comes approximately knee high."

Gifford was described by L. A. Fisher, on the day of the employment of the deceased, as "in bad shape; yes, sir, dirty and nasty."

"Q. Didn't you first say he looked about as bad as any man the captain had ever hired on the boat?

"A. Yes, sir.

"Q. That he was nasty and dirty and he looked just like an alcoholic; is that correct?

"A. Yes, sir.

"Q. And didn't you further state, that he was not drunk, but looked like he had just gotten off a drunk?

"A. That's right."

Later in the day the decedent told the man in charge of the boat and the only one on the boat, that he was going to jump overboard. Thereupon, Fisher, the one in charge left him alone. After that, the decedent was missing and his body was found three days later.

Concerning the condition of the boat, Fisher stated that "the hand rail or guard rail had been bent down on the bow of the boat by a hawser, and that it was dangerous to have had this hand rail in bad condition it was, especially in the night, when you couldn't see it, and during the day you had to look for it. I had told Captain Melvin about it and I understood that he had reported it to the Eastern Transportation Company for repair and they had done so. I put screws in it myself, to hold it up. I am positive that it was broken before Gifford came aboard."

If the deceased did not fall overboard by reason of the hand rail or guard rail being only knee high, or that the hand rail was in bad condition, especially at night, and during the day you had to look for it, Fisher said:

"Q. Why didn't you do something about saving this man from jumping overboard after he told you he was going to jump over?

"A. I was not in charge of the boat—only in charge of my job. I was in charge of the pumping, taking care of the boiler, and getting her on the way. As far as the crew, I had nothing in charge of them.

"Q. Didn't you just testify a moment ago in this record that in the absence of Captain Melvin you were in charge of this boat?

"A. I was in charge of this boat, but not the men.

"Q. The men could jump overboard, or do anything they pleased?

"A. That is up to them.

"Q. And you didn't care anything about them?

"A. No, if they were crazy enough to jump overboard."

Concerning the further character and disposition of the deceased on the day of his employment, L. A. Fisher said:

"Q. Didn't you also say this about his condition: 'He looked just like an alcoholic. If he was not drunk, he looked like he had gotten off of a drunk'?

"A. Yes, sir. He looked tough.

"Q. In connection with the upper deck, did you tell him he could not go up to the upper deck?

"A. There was nothing said about the upper deck."

Thus, it will be seen from the uncontradicted facts which are not contested by the defendant (since no testimony was offered by the defendant, or could be offered by the defendant, since the defendant's only witnesses were the witnesses for the plaintiff's decedent.)

By a decree entered September 30, 1949, the plaintiff's complaint was dismissed by the United States District

Court for the Eastern District of Virginia. The Court being of the opinion "that the defendant was not guilty of any omission or neglect nor of an affirmative act of negligence that would entitle the plaintiff to a judgment." This decree was affirmed by the United States Court of Appeals for the Fourth Circuit, by its opinion rendered January 31, 1950 to which opinion this appeal is made.

(B)

Reasons Relied On for Allowance of the Writ

(1) This is a case of great importance to Merchant Marinemen in connection with the conditions of employment and the ever present duty owed by master to a seaman.

(2) That the defendant was negligent in that its barge, the LUTHER E. HOOPER, was in an unseaworthy condition.

(3) The defendant was negligent in the employment and retaining in employ, the plaintiff's decedent in the condition in which the seaman was employed.

(4) That the courts below erred in their judgments for the reason that this case comes up before this Court on a motion to dismiss, there having been no evidence to the contrary.

(C)

Jurisdiction

The date of the judgment to be reviewed is January 31, 1950 and is reported in 179 Federal, 2nd page 478 (No. 3. Advance sheets). This Court has jurisdiction by virtue of Title 46 U. S. Code annotated, Section 688.

WHEREFORE, your petitioner respectfully prays that a writ of Certiorari, be issued out of and under the seal of this Honorable Court directed to the United States Circuit

Court of Appeals, commanding that court to certify and to send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and entitled on its docket 6018 P. B. West, Administrator of the Estate of *John Jacob Gifford, etc.* v. *Eastern Transportation Company, Incorporated,* a Corporation appellee, and that the said Judgment of the United States Circuit Court of Appeals for the Fourth District may be reversed by this Honorable Court and that your petitioner may have such other and further relief in the premises as to this Honorable Court may seem meet and just; and your petitioner will ever pray, etc.

P. B. WEST,
Administrator, etc.,
By LOUIS B. FINE,
Counsel for the Petitioner,
A Member of the Bar for the
Supreme Court of the United States.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 787

P. B. WEST, ADMINISTRATOR,

Petitioner

vs.

EASTERN TRANSPORTATION CO.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I

The Opinion of the Court Below

The opinion of the United States Court of Appeals for the Fourth Circuit is reported in P. B. West, Administrator *vs.* Eastern Transportation Co., etc., is reported in 179 Federal 2nd, page 478 (#3 advance sheets), and the opinion of the United States District Judge, is not reported, but is made a part of the record.

II

Jurisdiction

1. The date of the judgment to be reviewed is January 31, 1950.

2. The appellant respectfully represents that the lower court erred in affirming the judgment of the District Court.

3. Jurisdiction is specifically granted this Court under U. S. C. A. Title 46, Section 688.

III

Statement of Case

A summary of the case has been given under heading "A" in Petition for Writ of Certiorari and are more completely set forth as follows:

Captain Robert F. Melvin, Master of the barge, LUTHER E. HOOPER, owned and operated by the defendant employed the deceased John Jacob Gifford as a cook on said barge on the morning of May 22, 1947. The captain in his statement, admitted to the record by stipulation of the parties, set forth the condition of the seaman. In his statement the Captain says that he and Gifford went aboard the barge around 10:00 A. M. on the same morning. According to the testimony of Logan A. Fisher, donkeyman, on the barge, who testified that he was in charge of the boat during the Captain's absence, and that when he first saw the deceased, he was nasty and dirty and looked like he had just gotten off a drunk; and offered to lend his razor and some clothes to the deceased; that he assisted the deceased to find yeast powder for the bread he was making; that the deceased threw the dough which had been prepared without the yeast powder overboard and made more bread and prepared other foods for the mid-day meal.

Fisher further testified that about two, two-thirty, or three o'clock, after the Captain had gone ashore, the deceased came to the donkeyman's room where he was working and asked for a cigarette and at the same time remarked: "I am going to leave you," to which Fisher

replied "What, You just came aboard." Then the deceased said he was "going to jump over board" and that "he hoped he wouldn't disgrace his sister." Fisher states he told the deceased "to go back aft and lay down—that tomorrow he would feel better" and went below. At this time he and the deceased were the only men on the barge. When he returned the deceased could not be found. His body was found in the Harbor on May 25, 1947.

In the statement of the Captain, the rail of the barge is described as being knee high, and easy for an intoxicated man to fall over. The donkeyman Fisher describes it as being waist high. Fisher further testifies that something less than 12 feet of the railing near the bow had been bent over by the action of a hawser, but could not recall whether it had been repaired at the time of the deceased's disappearance and deceased was not seen on this part of the barge.

IV

Specification of Errors

1. The Circuit Court erred in affirming the judgment of the District Court in dismissing the complaint.

V

Argument

It has been held by this Honorable Court in numerous cases that on a motion to dismiss, the court will take all the evidence that is most favorable to the plaintiff for its consideration and would be considered by the trial judge as a demurrer to the evidence.

The following situation is uncontradicted:

1. The plaintiff had been drinking.

2. The handrail or guardrail, knee high.

3. Easy for decedent in a doped or intoxicated condition to lose his balance and fall over side of the LUTHER E. HOOPER.

4. Acted strange in preparing dough and throwing it out.

5. Said he was going to jump overboard.

6. Deceased had gotten off a big drunk and looked as bad as any man the captain ever hired—looked just like an alcoholic.

7. After having been told he was going to jump overboard, the one person in charge did not do anything about it.

8. Only one man in charge of the boat.

9. The railing on top, about ten feet, had been bent down and was in a dangerous condition.

Also in the absence of any evidence to the contrary the presumption of law is that the deceased met a natural death.

Social Justice, progressiveness and humanitarianism are authorities for the lack of care and attention that should have been exercised towards the deceased.

Point I. The defendant failed to exercise any care towards the decedent when the decedent said he was going to jump overboard.

Point II. The defendant failed to exercise reasonable care in the maintenance of said vessel in that the guard rail was only knee high, and that the top rail was bent down and in a dangerous condition.

Point III. The defendant failed to exercise reasonable care in the employment of the deceased, in the apparent condition that the deceased was in.

Point IV. The defendant failed to exercise reasonable care under all the circumstances hereinabove mentioned and

a combination of the foregoing result in the negligent treatment and manner of the plaintiff by reason of the employment of the deceased in his condition, and the maintenance of the boat and superintendence of the boat.

In its opinion the Circuit Court dismisses apparent lack of effect of the deceased's intoxication on his coordination in the performance of his duties while working on the barge the day of his employment and remarks that even if we assume that Gifford was somewhat intoxicated there is no evidence that this fact contributed to his demise.

It is humbly submitted that all of the facts in the case must be taken as a whole in producing a condition that was known to the defendant and required care and protection of the deceased and its failure to do so was culpable negligence resulting in the death of the deceased.

The existence of a low unsafe guard rail and one bent down so that its condition was dangerous constitute negligence of the barge owner irrespective of the intoxication of the deceased.

The man had been intoxicated, and may have still been, although not apparent, but the previous condition was known to both the captain and the donkeyman. The fact that he threw the dough out of the porthole undoubtedly impressed the donkeymen that he was not quite normal. Without these, where the man stated he was going overboard, the duty immediately attached to the donkeyman to observe his actions more closely.

It is submitted that the high degree of care required of the owner required that the deceased should have been guarded after expressing his intention to jump overboard.

Aguilar v. *Standard Oil Company*, 318 U. S. p. 724.

Page 728, Paragraph 4:

"Accordingly—Maritime Nations—have imposed broad responsibility for their health and safety upon

the owners of ships. In this country these notions were reflected early and have since been expanded, in legislation designed to secure the comfort and health of seaman aboard ship, hospitalization at home and care abroad."

Page 730:

"So broad is the shipowners obligation, that negligence or acts short of culpable misconduct on the seaman's part will not relieve him of responsibility."

Page 732:

"Appropriately it covers all injuries and ailments incurred without misconduct on the seaman's part, amounting to grounds of forfeiture at least while on the ship; subject to call of duty as a seaman and earning wages as such."

Page 731:

"Only some wilful misbehavior or deliberate act of indiscretion suffices to deprive the seaman of his protection. The traditional instances are venereal diseases—injuries received as a result of intoxication, though *an* occasion the latter has been qualified in recognition of a classic predisposition of sailors ashore."

Batkiewicz v. *Seas Shipping Etc.*, 66 Fed. Supp. 205.

The Court said:

"It is clear from the evidence that the deceased was in a depressed mental condition during the eleven days he was at Capetown, prior to his leaving on the ROBIN LOCKSLEY on June 27th. This condition can be readily accounted for by 13 days of exposure in the life boat after the sinking of the ROBIN MOOR.

"It is also clear that the deceased- condition rapidly deteriorated after he boarded the ROBIN LOCKSLEY.

• • •

"He said was 'going over the side'.

"And on Sunday night June 29th, he attempted three times to take his own life, but was prevented. * * *

"The deceased condition was brought to the attention of the Master of the ROBIN LOCKSLEY. * * *

"He did however, place a guard outside of the hospital door, Sunday night, but this guard was withdrawn early Monday morning. * * *

"This failure to guard the deceased during Monday constituted neglect for which the respondent is to be held responsible."

In the *Batkiewicz* v. *Seas Shipping Co., Ltd., supra,* the seaman's condition was the result of exposure occurring before he boarded the ROBIN LOCKSLEY from which he disappeared and in this case considerable precautions were taken to restrain the seaman, but when his guard was removed he disappeared from the ship and the owners were held liable.

Harris v. *Penn. R. R.*, 50 Fed. Supp. 866.

The court says on page 868:

"But we have no doubt that a legal obligation rests upon a ship, to use due diligence to save one of the crew, who by his own neglect falls into the sea and that the owner- are liable, if by failure to perform this duty his life is lost."

* * * * * * *

"The contract imposes upon the employer an exceptional obligation to care for the well being of the crew."

Page 869:

"That the ship will use every reasonable means to save the life of a human being who has no other source of help. The universal custom of the sea demands as much wherever human life is in danger. The seamans contract of employment requires it as a matter of right.

"We think also that the evidence was sufficient to justify the submission to the jury of the issue of negligence. The jury might well have concluded that

a greater degree of diligence should have been exercised by the mate in charge of the vessel and by the fireman on the deck at the time."

Here a man fell overboard without knowledge of any one or how it happens and attempt was made to rescue him. The fireman was included with equal weight of responsibility.

Cortes v. *Baltimore Line,* 287 U. S. 367 (p. 377).

"Out of this relation of dependance and submission there emerges for the stronger party a corresponding standard or obligation of fostering protection. There is doubt, and that substantial, whether the administrator of a railroad engineer, who by misadventure has fallen from his locomotive while a train is on a bridge, has a cause of action because of the failure of the crew of the train, to come to the rescue of their comrade. *Harris* v. *Penn. R. R.* (*supra*). There is little doubt that rescue is a duty when a sailor falls into the sea. *U. S.* v. *Knowles,* 4 Sawyer, 517 and that a liability to respond in damages is cast upon the ship owners if he is abandoned to his fate."

Page 378:

"When this concurrance of duty, of negligence and of personal injuries is made out, the seaman's remedy is to be the same as if a like duty had been imposed by law upon carrier by rail."

In all of these cases, either where the seaman was *in extremis* or merely threatened self destruction, the owner was held liable.

In the matter before the court, nothing was done whatsoever to prevent harm to the deceased by the defendants' agents. *It was purely negligence that the donkeyman failed to give credulity to the deceased's statement, under all of the circumstances.*

The Llewellyn J. Morse, 25 Fed. 973;

The Colusa, 248 Fed.

The above are authority for the law that:

Seaman having command shall not be held fellow servants with those under authority.

(In this the complainant was directly under command of a boatswain.)

In *Sadler* v. *Penn. R. R.*, 159 Fed. 784, supported by *Harris* v. *Penn. R. R.* (*supra*).

Cook fell in water.

It is elementary that proximate cause need not be shown by direct evidence.

In *Harris* v. *Penn. R. R.*, 50 Fed. 866, the court held the fireman and mate negligent in not using a life ring at hand, when they were making strenuous efforts otherwise. There is no difference in the negligence in the two cases. *In one case they failed to think of throwing a life ring to the man overboard in the instant case,* the donkeyman did not think it necessary to watch the man who said he would kill himself. *If he had he might have saved the drowning man or he may not have. The negligence lay in not doing everything possible under the circumstances. The point is that nothing was done in the instant case.*

Russel v. *Merchants and Miners Transportation Co.*, 19 F. S. 349.

Where a seaman threatened to kill himself, efforts were made to stop him, but the crew failed to continue to watch him, the seaman fell overboard and the owners were held negligent.

Batkiewicz v. *Seas Shipping Co., Ltd.*, 66 Fed. 205.

A seaman said he was "going over the side", guard was placed over the seaman, but relaxed and he disappeared.

On the motion to dismiss, which is the case at bar, all the inferences and the evidence are taken to be true and the same as a demurrer to the evidence. Authorities are unani-

mous on this proposition and will not be cited for the sake of brevity.

Summary of Argument

Point A. The defendant failed to exercise any care towards the decedent when the decedent said he was going to jump overboard.

Point B. The defendant failed to exercise reasonable care in the maintenance of said vessel in that the guard rail was only knee high, and that the top rail was bent down and in a dangerous condition.

Point C. The defendant failed to exercise reasonable care in the employment of the deceased, in the apparent condition that the deceased was in.

Point D. The defendant failed to exercise reasonable care under all the circumstances hereinabove mentioned and a combination of the foregoing result in the negligent treatment and manner of the plaintiff by reason of the employment of the deceased in his condition, and the maintenance of the boat and superintendence of the boat.

Conclusion

It is therefore respectfully submitted that this case is one calling for the exercise of this Court of its supervisory powers, and that a writ of certiorari should be granted and a review had of the decision of the United States Court of Appeals, Fourth Circuit, and finally reversing it.

Respectfully submitted,

LOUIS B. FINE,
Counsel for the Petitioner.

(8049)

End